FILED

MICHAEL RODAK, JR.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1974 (1973)

No. A-136 [73-1665]

MYER AARON RUBIN,
Petitioner,

vs.

BOB TURNER, Sheriff,
Oklahoma County, Oklahoma,

and

Hon. HEZ. J. BUSBY, Judge,
Hon. TOM BENNETT, Judge,

and

Hon. ROBERT D. SIMMS, Assistant Judge,
Court of Criminal Appeals, State of Oklahoma,

Respondents.

PETITION FOR REHEARING

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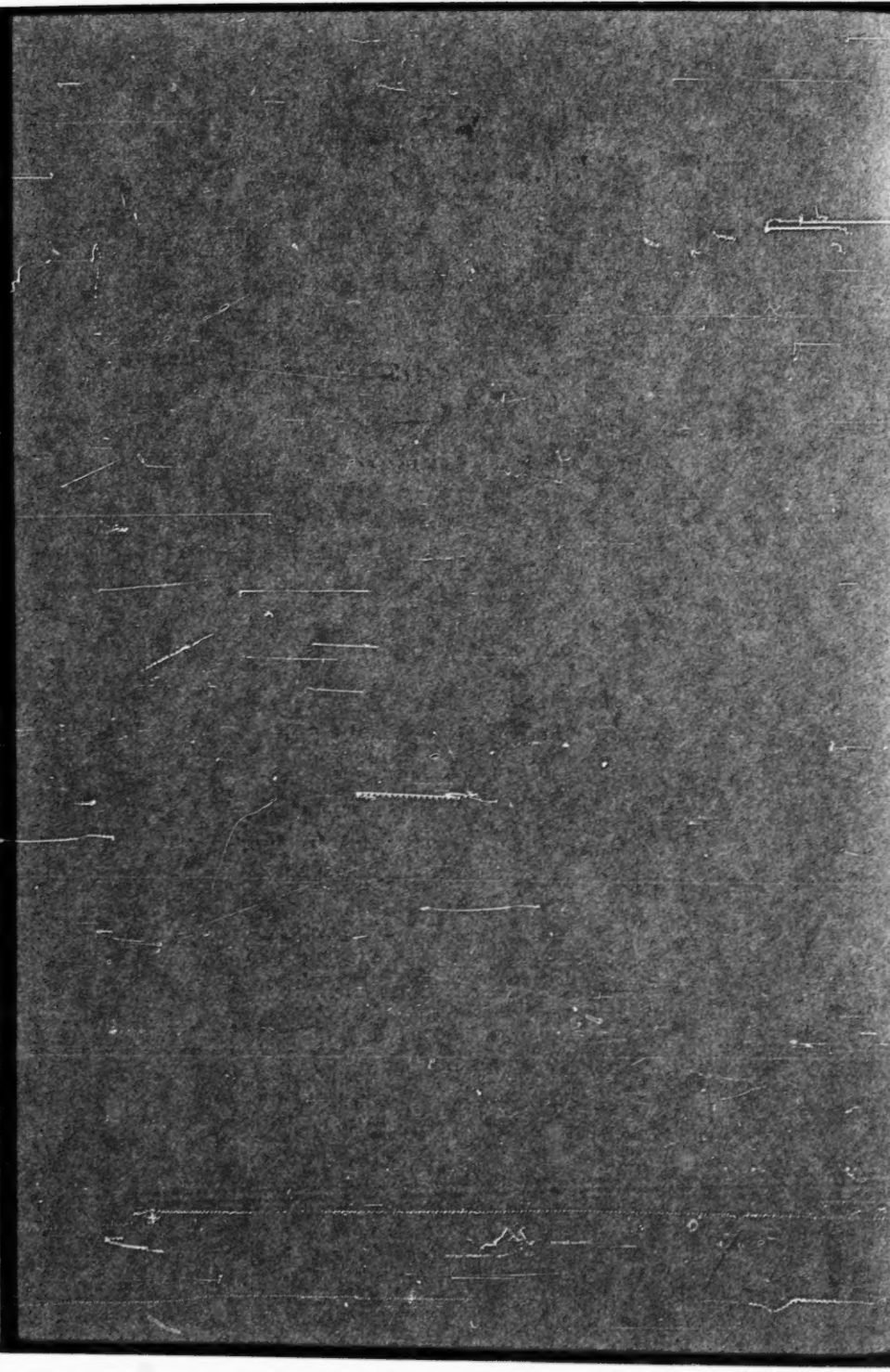

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Supreme Court Rule 58 1,7

IN THE
SUPREME COURT OF THE UNITED STATES

No. A-186

MYER AARON RUHM,
Petitioner,

vs.

BOB TURNER, Sheriff,
Oklahoma County, Oklahoma,

and

Hon. HEZ J. BUSSEY, Judge,
Hon. TOM BRETT, Judge,

and

Hon. ROBERT D. SIMMS, formerly Judge,
Court of Criminal Appeals, State of Oklahoma,
Respondents.

PETITION FOR REHEARING

Comes now Petitioner, MYER AARON RUHM, and for his instant Petition for Rehearing would respectfully allege and state that since the date of the Court's unfavorable action herein of October 15, 1974, there has occurred, in the sense of Supreme Court Rule 58, a material factual as well as jurisdictional change in circumstances material to the Court's action, and

compelling of a reconsideration thereof, to wit: that on November 21, 1974, the Petitioner returned to custody, and thereby ceased to be a fugitive; and therefore, during time allowed to file this Petition for Rehearing, the procedural basis for the Court's prior declining to consider the merits herein has been resolved in favor of (re)consideration on the merits.

WHEREFORE, premises considered, Petitioner respectfully urges that the Court may and should consider his Petition for a Writ of Certiorari and his Motion to Vacate and Remand on their merits; and, in view thereof, respectfully prays the Court to grant a Writ of Certiorari to the Honorable Court of Appeals for the Tenth Circuit and/or to vacate the Order of the Court of Appeals herein and to remand the Cause to the said Court of Appeals for further consideration in the light of said Court's own intervening consolidated decision(s) of *Terry Lee Radcliff* v. *Anderson, Warden,* and *Grider, Warden* v. *William Lynn Stringfield,* 10th Cir., Nos. 73-1520 and 73-1550, June 14, 1974 ____F.2d ____, (petition for rehearing en banc pending).

Respectfully submitted,

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Attorney for Petitioner

MEMORANDUM OF LAW

A. Substantive Summary

The Petitioner will but briefly refresh the Court's memory with the gravamen of his substantive plea: that Petitioner, a member of the statutorily unfavored male sex, was convicted in an Oklahoma court in 1970 at age 17 of the adult felony offense of "Possession of Marijuana," at a time when a like-aged similarly-offending member of the female sex, by virtue of 10 Okla.Stat, 1970 Supp., §1101(a), would only have been processed therefor as a mere juvenile and delinquent. In other words, since the said former 10 O.S. 1970 Supp., §1101(a) defined "juveniles" for delinquency (as opposed to criminal) purposes as males under 16 and females under 18, there existed at the time of Petitioner's alleged violation and prosecution therefor a statutory discrimination in Oklahoma's penal codes based solely upon the offender's biological sex, whereby the offender 16 or 17 years old of the male sex was prosecuted criminally for his misdeeds as an adult and a felon, whereas an offender 16 or 17 years old of the female sex committing identical (or even worse) offenses was only processed civilly therefore as a mere juvenile and delinquent.

Happily, this vicious penal discrimination based solely upon the youngster's anatomy was held unconstitutional in 1972 by the U.S. Court of Appeals for the Tenth Circuit,

Lamb v. *Brown*, 456 F.2d 18, which decision the Petitioner, whose instant conviction was then pending on direct appeal before the Oklahoma Court of Criminal Appeals, naturally cited in support and vindication of his own sex-equality arguments that he had already been urging prior to and independent of the *Lamb* v. *Brown* decision, supra. However, the State Court denied relief on the grounds of an asserted non-retroactivity of *Lamb* v. *Brown*. *Ruhm* v. *State* (Okla.Cr., No. A-16390, 1972) 496 P.2d 809, 815 (Brett, J., dissenting, at 816).

Federal relief was thereupon sought before the U.S. District Court for the Western District of Oklahoma. It should be noted that Petitioner's absence commenced during this period, no doubt in partial reliance upon the Federal Court's interim ruling that his absence would not be a bar to a consideration of the merits of his sex-equality claim for relief. See Appendix A hereto. However, the District Court also denied relief on the grounds of *Lamb* v. *Brown's* apparent non-retroactivity, *Rhum* v. *Turner, et al.* (W.D.Okla., No. CIV-72-420, 1973) 357 F.Supp. 324; and Petitioner's appeal to the Tenth Circuit was thereafter dismissed by said Court of Appeals by Order dated February 4, 1974, in *Ruhm* v. *Turner, et al.*, 10th Cir., No. 73-1259, unreported (which is the Order whose review is sought herein).

Subsequent to said dismissal, however, and indeed, while Petitioner's case was pending before the Supreme

Court, the Tenth Circuit either rethought or clarified its own position regarding the retroactivity of *Lamb* v. *Brown*, supra, quite probably in view of the subsequent Supreme Court retroactivity pronouncement of *Robinson* v. *Neil* (1973) 409 U.S. 505, and of the virtually identical *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, cert. den. 413 U.S. 922 (1973) -- and ruled *Lamb* v. *Brown* to be fully retroactive! *Terry Lee Radcliff* v. *Anderson, Warden,* and *Grider, Warden,* v. *William Lynn Stringfield,* 10th Cir., Nos. 73-1520 and 73-1550 (consolidated), June 14, 1974, ____F.2d____ (hereinafter referred to as *Radcliff* and *Stringfield*).[1]

Since the Tenth Circuit itself has now held *Lamb* v. *Brown* to be fully retroactive, then *a fortiori* this Petitioner's teenaged conviction is also void, since it was still non-final as per pendency on direct State appeal at the time of *Lamb's* rendition. See *Linkletter* v. *Walker* (1965) 381 U.S. 618, at 625-627, and *Long* v. *Robinson* (D.Md., 1970) 316 F.Supp. 22, at 30-31[2] Under such clear-cut revelation of fundamental and substantive constitutional error and injustice, the Court should strive to insure that mere procedure shall not be allowed to operate so as

[1]Reproduced at Appendix A to the Petitioner's "Motion to Vacate and Remand" herein. (Petition for rehearing en banc pending.)

[2]Aff'd 436 F.2d 1116 (4th Cir., 1971), and held fully retroactive in *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, cert. den. 413 U.S. 922 (1973).

possibly to deny this one Petitioner, alone of all similarly-situated teenaged appellants and petitioners, the benefit of the very argument he has been advancing now for upwards of four years.

B. Procedure

It is perfectly evident that the Supreme Court denied Petitioner a writ of certiorari herein not because of any lack of merit to his substantive, penal sex-equality claims, but essentially for the procedural reason that the Petitioner was not in custody -- as evidenced by the fact that the Court, in denying the writ on October 15, 1974, did not merely recite the usual "Denied," but instead stated, "The petition for a writ of certiorari is denied. See *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970)."

Thereafter, on November 21, 1974, the Petitioner returned to custody, and, pending further proceedings, has since been enlarged on $25,000 bond by the Municipal Court of the City of Los Angeles, State of California, Division No. 30, in Case No. A-313668, the Hon. Manuel Chavez, Municipal Judge, presiding. These events took place while the instant case was still "alive" before the Supreme Court during time within which to file an appropriate petition for rehearing; and the instant Petition for Rehearing is being filed within extension for the submission thereof, as per the Motions of the Petitioner's

father as well as counsel, outlining the need (based on counsel's temporary military absence) of an extension in order to properly present to the Court the change in material circumstances brought about by the Petitioner's return to custody.

* * *

A preliminary question, of whether the Petitioner's return to custody (and the resulting termination of his fugitive status) constitutes an "intervening circumstance of substantial or controlling effect" in the sense of Supreme Court Rule 58(b), can self-evidently be answered in the affirmative, for when an appellate-type action is not entertained by an appellate court for the stated reason of the appellant's absence, the appellant's return in obviously not only *an* "intervening circumstance of substantial or controlling effect," it is *the* (i.e., *only*) such intervening circumstance -- if indeed, anything is!

The other question relevant to this rehearing is simply whether the Petitioner's return was timely. The decisional authority on this point discloses an affirmative answer thereto.

At the outset, it should perhaps be recognized that the juridical basis for striking an appellate-type action of a fugitive is not, in the absence of statute, entirely clear. In *Smith* v. *United States* (1876) 94 U.S. 97, the Supreme

Court cited "mootness" as the basis for dismissing fugitives' appeals and/or petitions:

> "If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not as he may consider most for his interest. Under such *circumstances, we are not inclined to hear and* decide what may prove to be only a moot case."

Id., 94 U.S. at 97, 24 L.Ed. at 32. But *quaere*, can "mootness" withstand rigid analysis as the basis for dismissing fugitives' appeals? If "mootness" be the grounds therefor, that would be tantamount to saying that a criminal appeal loses its character as a "case or controversy" in the sense of Article III of the Constitution whenever the appellant flees; and if that be true, then, under Article III, there would clearly be no *jurisdiction* to entertain such an appeal. But in *Smith* v. *United States*, supra, the Supreme Court expressly held its discretionary, not jurisdictional, for the Court to decline to adjudicate the appeal's merits:

> "It is clearly within our discretion to refuse to hear a criminal case in error unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render."

Id., 94 U.S. at 97. A "discretionary" as opposed to a "jurisdictional" approach to the disposition of fugitives' appeals would also appear compelled by the modern reconsideration of the "mootness" concept. see. e.g., *Sibron* v. *New York* (1968) 392 U.S. 40, Part I, at 50-58, and *Carafas*

v. *LaValle* (1968) 391 U.S. 234. Indeed, the modern fugitive cases themselves have indicated that "mootness" -- in the sense of a jurisdictional lapse for lack of a judiciable "case or controversy" -- is not the reason for the dismissal of fugitives' appeals. *Eisler* v. *United States* (1949) 338 *U.S. 189; Molinaro* v. *New Jersey (1970) 396 U.S. 365.* Moreover, if we were to view Federal appellate jurisdiction as entirely the creation of statute (see Const., Art. III, Sec. 2, Cl. 2), and if no statute actually divests Federal appellate tribunals of jurisdiction over fugitives' appeals (or authorizes their dismissal), then clearly, the judicial disposition of such appeals must depend not upon a lapse of jurisdiction, but upon some other source, such as the Judiciary's inherent power to control its own dockets.

State decisions also support the theory that, at least in the absence of statute, the disposition of fugitives' appeals is more a matter of discretion than of strict jurisdiction by the appellate tribunal; and indeed, in Oklahoma itself the rule appears to be that if the appeal of even a fugitive discloses *fundamental* error, the discretion of the appellate court is better exercised in going ahead and reversing the obvious injustice on its merits, regardless of how 'deserving' thereof the fugitive might be deemed to be because of his flight. *Brigman* v. *State* (Okla.Cr., 1960) 350 P.2d 321; *Shamblin* v. *State* (1949) 90 Okla.Cr. 33, 210 P.2d 197; *Rushing* v. *State* (1948) 86 Okla.Cr. 241, 190 P.2d 828, 831.

Deducing, then, that the disposition of a fugitive's appeal is a matter vested almost entirely within the Court's sound discretion, to be exercised on whatever grounds the Court deems to be just and proper, what, then, is the just and proper course when, as here, the fugitive reappears only 37 days after the Court's initial denial or dismissal, still during Term time, and even within time to petition for rehearing based on the one change in material circumstances really relevant to dismissal *vel non*?

Curiously, there appears to be little decisional authority on this precise point. In the Supreme Court case previously quoted from, of *Smith* v. *United States*, supra, 94 U.S. 97, the Court had patiently kept the plaintiff-in-error's appeal on the docket for *six years* in the hopes he would turn himself in--and then ordered the appeal dismissed unless he should surrender himself before the first day of the *next* October Term. And in *Bohanan* v. *Nebraska* (1887) 125 U.S. 692, the plaintiff-in-error was given until the last day of that Term. In the more modern case of *Eisler* v. *United States* (1949) 338 U.S. 189, the fugitive petitioner's case was "left off the docket" (338 U.S. at 190) by the majority opinion on June 27, 1949 -- yet it was not until well into the next October Term, on November 21, 1949, that the Court formally dismissed his petition for certiorari. 338 U.S. 883. A somewhat more stringent posture was taken in *Molinaro* v. *New Jersey* (1970) 396 U.S. 365, yet the Court there did not lay down

any *per se* rule for immediate dismissal therein, but rather, merely stated that the dismissal of a fugitive's appeal "*need* not" be given any specific "period of grace." 396 U.S. at 366. Moreover, the record is silent in *Molinaro* as to what would have happened had the appellant promptly, and in time for rehearing, returned to custody.

The few State cases on the subject also indicate that the judicial discretion involved in the disposition of fugitives' appeal is best exercised, at least in the absence of statute to the contrary, in favor of adjudicating the merits thereof so long as the appellant surfaces in term time, or otherwise while the appeal is in any sense "alive". *Knight* v. *State* (1950) 190 Tenn. 326, 229 S.W.2d 501; *Crawford* v. *State* (1953) 8 Terry (47 Del.) 552, 94 A.2d 603; *Harrelson* v. *State* (1954) 222 Miss. 514, 76 So.2d 516.[3] See also *White* v. *State* (Alas., 1973) 514 P.2d 814. This rule is no doubt akin to that fundamental principle of jurisprudence that adjudications of serious controversies on their substantive merits are favored in the law, and that courts will normally strive to set aside what amount to default judgments -- particularly in cases of some

[3]Modified somewhat in *Jones* v. *State* (Miss., 1969) 218 So.2d 705 to allow a flat 90-day period of grace from the announcement of the tentative dismissal.

cognizable degree of dispatch after the default is entered. see, e.g., *Singleton* v. *LePak* (Okla., 1967) 425 P.2d 974.[4]

Determining, then, that there is clearly no jurisdictional obstacle to the Court's present (re)consideration of the Petitioner's action-in-chief herein on its merits, but rather, that the Court may take whichever course it desires in its own discretion, and remembering further that this discretion to consider on the merits is normally exercised affirmatively whenever the appellant returns to custody, as this Petitioner has, while his case is still "alive" before the appellate tribunal, and/or whenever the appellate petition discloses plain or fundamental error (recall the *Brigman* line of cases, cited at page 9, supra), the Petitioner would then conclude this Petition for Rehearing with the following points directed to the Court's discretion:

First, the fundamental correctness of the Petitioner's retroactive - invalidity - of - substantive - sexual - criminal - discriminations arguments are incontrovertly established by compounding *Frontiero* v. *Richardson* (1973) 411 U.S. 677, with *Robinson* v. *Neil* (1973) 409 U.S. 505.

[4]In the interests of completeness, Petitioner would mention the ancient case of *Allen* v. *Georgia* (1897) 166 U.S. 138, wherein the Supreme Court affirmed the Supreme Court of Georgia's dismissal of a fugitive's appeal even after his reappearance - but even in that case, the State court did in fact grant the fugitive a 60-day period of grace to return to custody -- which the appellant exceeded by some eleven months.

And second, the "plain error" of Petitioner's action is readily evident from the fact that the Tenth Circuit itself has now held *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, fully retroactive, and has thereby necessarily included Petitioner's own conviction within those now constitutionally voided! *Terry Lee Radcliff* v. *Anderson, Warden,* and *Grider, Warden* v. *William Lynn Stringfield,* 10th Cir., Nos. 73-1520 and 73-1550 (consolidated), ____F.2d____,[5] citing *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, cert. den. 413 U.S. 922 (1973).

Finally, counsel would respectfully invite the Court's attention to the Petitioner's youthful age; his "adult" prosectuion for the "felony" (since reduced to a misdemeanor) of having the misfortune to have been driving someone's car into which someone had thrown the butt of a burned marijuana cigarette and some suspicious-looking seeds[6] -- which were discovered under the seat by police making a "routine" search incidental to a traffic offense (which was later dismissed) -- and for which the Petitioner was sentenced to the maximum seven years[7] in the infamous Oklahoma State Penitentiary.[8] And to these

[5]Petition for rehearing en banc pending.

[6]See dissenting opinion to Petitioner's State affirmance, *Ruhm* v. *State,* supra, 496 P.2d at 816.

[7]Reduced on appeal to a "mere" four years and a fine. *Ruhm* v. *State* (Okla.Cr., 1972) 496 P.2d at 815.

[8]So condemned in *Battle and The United States* v. *Anderson, Warden, et al.* (E.D. Okla., 1974) 376 F.Supp. 402.

purely legal miscarriages of justice must be added the staggering expense in legal and related fees which have crushed the youth's family over the years this litigation has dragged on, not to mention the mental anguish and psychic trauma by which the intervening years of agonizing anxiety have driven the Petitioner (at least in the opinion of counsel) to the bounds of mental disturbance and even disorder.

Indeed, this is not a case of the State of Oklahoma "merely" seeking its legal "pound of flesh" -- the State apparently craves the Petitioner's blood and soul as well in what could well constitute a paradigm microcosm of everything that is wrong with contemporary State and local "prosecutionism." It is difficult, of course, not to feel some sense of reproval for the Petitioner's apparent weakness for "taking the law into his own hands" for a while, though certainly his youth and the oppressive circumstances of this case cry out at least in mitigation thereof. Yet *quaere*, has the State been truly prejudiced thereby? Obviously not, for all the State has "lost" was its "right" to incarcerate the Petitioner pursuant to a conviction which even the local Circuit itself would now void and vacate. Petitioner's true offense (other than to himself) sounds perhaps more in an affront to the judicial process than to the State, which, counsel would again suggest, was to some degree "allowed" by the Federal Court itself (Appendix A) after possibly being provoked by the State Court (see Appendix B).

But that is past, and the Petitioner is back -- in time. He therefore submits that an abundance of legal and discretionary bases exist for the Court to sustain his Petition for Rehearing, and to consider on the merits and to grant his Petition for a Writ of Certiorari, whether for plenary consideration by the Supreme Court, or as per the Motion to Vacate and Remand, for reconsideration by the Court of Appeals in the light of the Circuit's own recent *Radcliff* and *Stringfield*, supra.

Respectfully submitted,

FREDERICK P. GILBERT
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103

Attorney for Petitioner

CERTIFICATE OF COUNSEL

I, Frederick P. Gilbert, counsel for the Petitioner herein and a member of the Bar of this Honorable Court, do hereby certify, pursuant to Supreme Court Rule No. 58(b), that this Petition for Rehearing is presented in good faith and not for delay; and I certify further that the instant Petition for Rehearing is limited to one intervening circumstance of substantial and controlling effect, to wit: the termination of the Petitioner's status as a fugitive, effected by his return to custody (and present enlargement on bond) on or about November 21, 1974.

FREDERICK P. GILBERT
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103

Attorney for Petitioner

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MYER AARON RUHM,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case No. 72-420 Civil
	)	
BOB TURNER, Sheriff, Oklahoma County, Oklahoma,	)	
	)	
	)	
Defendant.	)	

ORDER

The Defendant's Motion To Dismiss based on his assertion that the Plaintiff is not "in custody" is overruled.

The Complaint appears to contain a civil rights action. Custody is not an essential to this type of action. Defendant will answer the Complaint within ten (10) days from the date hereof.

It is so ordered this 21 day of August, 1972.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. A-16,390

MYER AARON RUHM,
Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA,
Defendant in Error.

ORDER DENYING BOND

WHEREAS, it is anticipated that an appeal to Federal District Court or the United States Supreme Court may be forthcoming in the above-styled and numbered cause on a jurisdictional question;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that bond, pending any further proceedings in any Court, be, and the same is, hereby DENIED.

WITNESS MY HAND AND SEAL OF THIS COURT this 1st day of May, 1972.

/s/ Hez J. Bussey
Presiding Judge

/s/ Robert D. Simms
Judge